UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND THE ORIGINAL JUDGMENT ON COSTS AND MOTION FOR ATTORNEY'S FEES AND COSTS 42 U.S.C. §§ 1973*l*(e), 1988

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

The plaintiffs prevailed in this action—on that there should be no legitimate dispute. Act 43 violates federal law. Its implementation is enjoined. No elections will be held under *any* legislatively-adopted boundaries unless and until a judicial remedy is in place for the entire state that cures the Voting Rights Act violations in Assembly Districts 8 and 9. In the face of a presumption favoring legislatively-enacted redistricting, plaintiffs overcame a heavy burden to show that Act 43 cannot, as enacted, be used for any elections. The redistricting plan for the next decade will be of this Court's choosing, as it has long been before, although it will necessarily reflect the legislature's intent to the extent permissible and discernible. Act 43 will not govern the next elections; the Court's plan will.

From the outset, the plaintiffs have sought an award of their fees and costs under 42 U.S.C. §§ 1973*l*(e) and 1988. *See* Cmplt. (Dkt. 1) at 13. As the prevailing parties in a civil rights action, plaintiffs are entitled—in the absence of "special circumstances"—to their costs and reasonable attorney's fees. The Baldus plaintiffs and Voces plaintiffs (collectively

"plaintiffs") each have requested that relief, and no party has yet disputed their entitlement to fees—appropriately so, because the fee demand could only advance once this Court ruled in plaintiffs' favor. Yet the memorandum opinion and judgment that established plaintiffs' prevailing party status also provided, without explanation or discussion, "that each party is to bear its own costs." Mem. Op. (Dkt. 210) at 38; Judgment (Dkt. 211) at 3.

In the absence of a contrary request or a statutory mandate, it is within the Court's discretion to order that costs be borne by each party. When the prevailing party in a civil rights action asks for fees, however, the presumption for their award is statutory and strong. By ordering each party to bear its own "costs," the Court commented—in effect, if not by intent—on a fee petition that plaintiffs had not then had the opportunity (or the obligation) to file.

Plaintiffs therefore begin by moving the Court, pursuant to Rule 59(e), to withdraw its initial determination of costs from the order and judgment. The plaintiffs simultaneously move for attorney's fees and other costs, under 42 U.S.C. §§ 1988 and 1973*l*(e), permitting the Court to consider that statutory request—along with inevitable opposition from the Department of Justice.

The standards governing fee awards, and the rationales underlying those standards, are clear and uncontroversial. Plaintiffs ask only to make their case without being adversely affected by the "bear its own costs" language of March 22, 2012. To decline this request to withdraw the cost language would have the potential effect either of denying plaintiffs their statutory right to seek attorney's fees and costs or leading plaintiffs to move for them in disregard of nine words in a judgment.

Plaintiffs also move, by necessity, for an award of attorney's fees. Although costs are a component of a statutory attorney's fees award, and the judgment—in its present form—allows

no cost-shifting, a motion for attorney's fees must be filed "no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i). That deadline is today and, notwithstanding the litigation's continuation, the plaintiffs file their motion from an abundance of caution. Plaintiffs' motion to alter or amend the judgment, if granted, simply eliminates an uncertainty for the motion for attorney's fees that accompanies it.

In light of this procedural posture, the Baldus plaintiffs also provide—as required by Rule 54(d)(2)(B)(iii)—a "fair estimate" of "the amount sought," asking that the Court "decide issues of liability for fees before receiving submissions on the value of services." Fed. R. Civ. P. 54(d)(2)(C).[1] The Voces plaintiffs have more fully documented their fee request. The Baldus plaintiffs will supply the necessary documentation as soon as the Court requests it, and will file a bill of costs if "a judgment for costs" in plaintiffs' favor is entered. *See* Civ. L.R. 54(a)(1) (providing for "the party *in whose favor a judgment for costs is awarded* or allowed by law and who claims the party's costs" to file a bill of costs no later than 14 days after the entry of judgment) (emphasis added); *see* 28 U.S.C. §§ 1920, 1924. To file such materials now would be, at best, premature.

DISCUSSION

I. ATTORNEYS' FEES ARE AVAILABLE TO PREVAILING PARTIES WITH SUCCESSFUL VOTING RIGHTS ACT CLAIMS.

Awarding attorney's fees to the prevailing party is a cornerstone of Congress's approach to the enforcement of its civil rights laws, including the Voting Rights Act. *See Perdue v. Kenny A.*, 130 S. Ct. 1662, 1671 (2010). The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983," among others, "the court, in its discretion, may allow the prevailing party,

[1] This case is now in its remedial phase, of course, and fees and costs continue to accrue.

other than the United States, a reasonable attorney's fee as part of the costs . . . ." Expert fees may be included "as part of the attorney's fee." 42 U.S.C. § 1988(c).

The language of section 1988 was patterned after a similar provision in the Voting Rights Act itself: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs." 42 U.S.C. § 1973*l*(e).[2]

The Voces plaintiffs and the Baldus plaintiffs both alleged, explicitly and repeatedly, that Act 43 violates section 2 of the Voting Rights Act and section 1983 of the Civil Rights Act. In their October 31, 2011 complaint, No. 11-CV-1011 (Dkt. 1), the Voces plaintiffs brought a single Voting Rights Act claim based on Act 43's unlawful dilution of Latinos' voting strength in Assembly Districts 8 and 9. The same claim appears as Claim Six in the Baldus plaintiffs' nine-claim pleading. *See* Second Am. Compl. (Dkt. 48). Each complaint also alleges that conducting elections under the Act 43 boundaries would deprive plaintiffs of their civil rights under color of law in violation of section 1983. *See* Voces Compl. ¶ 33; Second Am. Compl. ¶ 79. Plaintiffs all explicitly requested an award of "attorneys' fees and costs incurred in this action." Voces Compl. at 9; *see also* Second Am. Compl. at 36 (requesting that plaintiffs be awarded "their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action").

Under the "American Rule," the federal courts "follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" *Buckhannon Bd. & Care*

[2] Section 2 of the Voting Rights Act, whose language "no more than elaborates upon that of the Fifteenth Amendment," was intended "to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). A section 2 claim is therefore an action to "enforce the voting guarantees of the fourteenth or fifteenth amendment," 42 U.S.C. § 1973*l*(e), for which attorney's fees are generally available to the prevailing party.

Home, Inc. v W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001) (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994)). Congress supplied precisely that authority in § 1973*l*(e) and § 1988. *See* 532 U.S. at 602-03. "The purpose of § 1973*l*(e) and § 1988 is 'to ensure effective access to the judicial process' for persons with civil rights or voting rights grievances." *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 412 (7th Cir. 2005) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)). Because they "contain nearly identical language and are driven by similar congressional purposes," sections 1973*l*(e) and 1988 are "construe[d] . . . similarly." *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1439 n.10 (7th Cir 1993).

Although sections 1973*l*(e) and 1988 both "commit fee awards to the district court's discretion, Congress has nevertheless made clear that prevailing plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Id.* at 1439 (quoting legislative history). To determine whether civil rights plaintiffs are entitled to fees, the Court therefore begins by asking whether plaintiffs are the prevailing party and, if so, whether any special circumstances should bar a fee award. In the absence of such an obstacle, the only remaining question is the reasonableness of the fees and costs in light of the success obtained.

II. PLAINTIFFS SATISFY THE REQUIREMENTS FOR AN ATTORNEY'S FEE AWARD.

A. Plaintiffs Are Prevailing Parties.

"A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought . . . ." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791 (1989); *see also Hensley v. Eckerhart*, 461 U.S. at 433 (characterizing plaintiffs as "prevailing parties" if they "succeed on *any* significant issue in litigation which achieves *some* of

the benefit the parties sought in bringing suit") (emphasis added). Plaintiffs cross into prevailing party territory as soon as they "'receive at least some relief on the merits of [their] claim.'" *Buckhannon*, 532 U.S. at 603-04 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

Plaintiffs alleged that Act 43, now adjudged invalid, unlawfully compromised the ability of Milwaukee Latinos to elect the candidate of their choice; as a remedy, they demanded the creation of a majority-minority district with an *effective* Hispanic citizen voting-age majority. Second Am. Compl. ¶¶ 77-79; Voces Compl. ¶¶ 29-33. The Court agreed, finding "that the Baldus and Voces plaintiffs are entitled to relief on their Section 2 claim concerning New Assembly Districts 8 and 9, because Act 43 fails to create a majority-minority district for Milwaukee's Latino community." Mem. Op. at 33.

Plaintiffs also sought to enjoin the implementation of Act 43 and to "establish a judicial redistricting plan" that meets "the requirements of the U.S. Constitution and statutes and the Wisconsin Constitution and statutes." Second Am. Compl. at 35; *see also* Voces Compl. at 8-9. The Court did precisely that, first ordering that "the Government Accountability Board is hereby ENJOINED from implementing Act 43 in its current form," Mem. Op. at 37, and then recognizing that "the task to make the changes required for a lawful redistricting plan now falls" to the Court. Order (Dkt. 218) at 3.

Although the Court has yet to adopt valid boundaries to remedy the Voting Rights Act violations, there can be no doubt that the boundaries chosen will cure the defects alleged and thereby grant plaintiffs "at least some relief on the merits . . . ." *Buckhannon*, 532 U.S. at 603. By enjoining the implementation of Act 43, the Court has already afforded plaintiffs at least "some of the relief sought" as to a "significant claim" on which they succeeded. *Texas State Teachers Ass'n*, 489 U.S. at 791. Plaintiffs are, there should be no doubt, the prevailing parties.

They would be, moreover, even if the Court adopts the Department of Justice's plans. Even its proposed boundaries are not Act 43's boundaries, although they share similar flaws.

The Voces plaintiffs brought a single claim and won it all. That the Baldus plaintiffs, in achieving the same result, prevailed on one of their multiple claims has no effect on their prevailing party status. "[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Texas State Teachers Ass'n*, 489 U.S. at 790. The Voces and Baldus plaintiffs each "proved discrimination and obtained relief in the form of [an] additional [Latino] majority ward. That was substantial relief though less than they sought." *Barnett v. City of Chicago*, 3 F. App'x 546, 547 (7th Cir. 2001).

B. No Special Circumstances Justify Denying Attorney's Fees.

No special circumstances stand in the way of a fee award. Plaintiffs' "ability to pay for legal representation," whatever that may be, "is not a special circumstance justifying denial of attorneys' fees." *Hastert*, 28 F.3d at 1443. And nothing about the GAB's status adversely affects plaintiffs' entitlement to fees. Indeed, the Seventh Circuit has concluded that, "as an agency of the state," the Illinois State Board of Elections—that state's counterpart to the GAB (which is itself the successor agency to Wisconsin's State Election Board)—"may properly be held accountable for the prevailing parties' attorneys' fees" in a Voting Rights Act case. *Id.* at 1444.

Although the GAB surely did not draft Act 43, it is charged with implementing the statute and, in the absence of any other party, defending it against challenge. The GAB is also, significantly, "responsible for the relief requested by . . . the plaintiff[s] . . . in this case: to have . . . elections conducted in accordance with the United States Constitution and federal law

governing elections." *King*, 410 F.3d at 423-24. As such, it is "appropriate to assess an attorneys' fee award against" the GAB. *Id.* (quoting *Hastert*, 28 F.3d at 1444).

Plaintiffs can conceive of no other "special circumstance" that the Department of Justice could raise as a basis for avoiding its obligation to pay plaintiffs' fees. To the extent there are any asserted, plaintiffs will address them on reply. In fact, the only special circumstances here *support* the award of attorney's fees. No one needs a reminder of the unusual, if not—at times—bizarre, path this litigation has followed. The Court already has awarded attorneys' fees against the counsel for the legislature. *See* Jan. 3, 2012 Order (Dkt. 104) at 11. While it took pains there to ensure that the taxpayers of this state did not pay for the conduct at issue, the taxpayers will pay any legal fees and costs awarded here. Too, they will be the beneficiaries of a redistricting plan adopted by a federal court that complies with federal law. Nor is there any suggestion that the costs and fees awarded will threaten the budget of an independent and small state agency already immersed in conducting recall, special and regular elections.

But then it has been the Department of Justice and the private co-counsel paid by the taxpayers (the private firm has a $925,000 cap on its fees since last December) that made the tactical and strategic judgments, apparently reflecting an array of state interests, to defend Act 43 and, now, to address a remedy for its flaws. Specifically, they three times declined this Court's invitation to address legislatively the Voting Rights Act infirmities in Assembly Districts 8 and 9 that led to the need for a trial, for extended testimony on the Voting Rights Act claims and, finally, to the Court's judgment for the plaintiffs and against the defendants and the pending remedial phase.

C. Plaintiffs Request A Reasonable Award That Accounts Primarily For Time And Costs Devoted To The Prevailing Claim.

The fee-shifting statutes do not guarantee any fee but only one that is "reasonable." 42 U.S.C. §§ 1973*l*(e), 1988(b). "[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue*, 130 S. Ct. at 1672. To yield a fee "that is presumptively sufficient to achieve this objective," courts apply "the lodestar method," *id.* at 1673, "which is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended," *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). Prevailing plaintiffs are also entitled to "reasonable expert fees, and other reasonable litigation expenses as part of the costs." 42 U.S.C. § 1973*l*(e).

The Voces plaintiffs brought one claim and succeeded completely on that claim. Although the Baldus plaintiffs likewise succeeded on the issue of Milwaukee's Latino majority-minority district, they "have not achieved complete success" because they also brought claims that the panel did not address or declined to accept. *See Texas State Teachers Ass'n*, 489 U.S. at 789. When not all claims are successful, if plaintiffs' claims "arise out of a common core of facts, and involve related legal theories, . . . 'the most critical factor is the degree of success obtained.'"[3] *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. at 436). "[T]he district courts should exercise their equitable discretion in such cases to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff." *Id.* at 789-90.

The Supreme Court has "explicitly counseled *against* applying . . . 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon.'"

[3] By contrast, where "the plaintiff's claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claims," then "these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Texas State Teachers Ass'n*, 489 U.S. at 789.

Sottoriva v. Claps, 617 F.3d 971, 976 (7th Cir. 2010) (quoting *Hensley*, 461 U.S. at 435). The Baldus plaintiffs' fee cannot, therefore, be determined by dividing their total hours by the number of claims. Indeed, as this Court recognized, the successful claim "consumed nearly all of the trial time." Mem. Op. at 12. Although it was only one of the claims in the Baldus plaintiffs' complaint, the Voting Rights Act claim consumed a disproportionate amount of counsel's time and attention and a disproportionate amount of the costs, including expert witness time.

The exercise of discretion here is straightforward because plaintiffs are requesting less in fees than they are entitled to receive and, for the Baldus plaintiffs, significantly less than their discounted total fees. The plaintiffs are still in the process of aggregating and documenting their fees and costs—whether they are available under 42 U.S.C. §§ 1973*l*(e) or 1988 or the cost statutes, 28 U.S.C. §§ 1920 and 1924. This task is simpler for the Voces counsel, whose time and efforts focused exclusively on the prevailing claim. For that reason, the Voces plaintiffs provide with this motion their "submissions on the value of services." *See* Fed. R. Civ. P. 54(d)2)(C); *see also* Declaration of Peter Earle and Declaration of Jacqueline Boynton. Counsel for the Voces plaintiffs seeks $187,454.22 in attorney's fees and $25,995.56 in costs.

The counsel for the Baldus plaintiffs are making a good faith effort to segregate their time devoted to the Voting Rights Act claim from time devoted to other claims. While the allocation of attorney's fees is not a mathematical exercise, solely dependent on the number of successful claims divided by the number of unsuccessful claims, an estimated allocation would assist the Court in its determination of reasonableness. The Baldus plaintiffs initiated this action on June 10, 2011, nearly five months before the Voces plaintiffs. Their counsel's time records—and their work, including the successful defense of the Department of Justice's motion to

dismiss—necessarily are more voluminous than those of the counsel for the Voces plaintiffs. Moreover, the respective counsel also require additional time to ensure that their collaborative efforts, both frequent and efficient, are accounted for appropriately in any final request for fees.

The Baldus plaintiffs' request for legal fees will be comparable to those of the Voces plaintiffs in their rates. Their preliminary estimate, based on discounted rates and the successful claim, is approximately $350,000 in fees and $125,000 in costs.

It is worth noting that the two plaintiff groups often shared costs—for their expert witness, for example—and they are taking pains to ensure that the chargeable costs are not duplicated. The Baldus plaintiffs request, accordingly, pursuant to Rule 54(d)(2)(C), that the Court "decide issues of liability for fees before receiving submissions on the value of services" by their counsel. This will allow counsel to identify the precise time entries that are reasonable in light of the successful claim. In addition to this estimate of the reasonable attorney's fees sought, the Baldus plaintiffs have also provided an initial and preliminary summary of costs (not legal fees) on Exhibit A to this memorandum. [4] Like attorneys' fees, the costs are still accumulating.

III. THE JUDGMENT SHOULD BE AMENDED TO ALLOW AN AWARD OF ATTORNEY'S FEES AND COSTS.

"Although the fee shifting statutes commit fee awards to a district court's discretion, such discretion is . . . quite narrow once prevailing party status has been determined." *Hastert*, 28 F.3d at 1443. Given the absence of special circumstances and the reasonableness of plaintiffs' requested fees, the "narrow" discretion this Court could (in theory) wield to deny this request may well be non-existent. Attorney's fees should be awarded. The statute permits it. The unique circumstances of this case should compel it.

[4] Plaintiffs will file a bill of costs once they are a "party in whose favor a judgment for costs is awarded." Civ. L.R. 54(a)(1).

Before the Court can determine liability for attorney's fees and costs, however, it should amend the judgment so that it no longer suggests, even inferentially, a different result. It is for that reason that plaintiffs move, first, to amend the judgment to withdraw the statement that each party is to bear its own costs. Such an order is not consistent with the statutory fee-shifting regime Congress put in place "to ensure that federal rights are adequately enforced." *Perdue*, 130 S. Ct. at 1671. Even if the Court were to determine that an award of attorney's fees is not appropriate here, such a decision should not be made based only on a record in which fees were never addressed in detail and the Court has not ordered a remedy. Thus, no matter how the Court rules on the motion for attorney's fees, it should—at least as an initial matter—amend the judgment to eliminate the cost suggestion.

Once the judgment is amended, the Court should grant plaintiffs their reasonable attorney's fees and costs. Plaintiffs prevailed. No special circumstances bar a fee award. And plaintiffs have already discounted their fee request so that no downward adjustment by this Court is even necessary. The only question remaining is the reasonable value of counsel's services, comprehensive documentation of which plaintiffs will provide following determination of liability for fees or at the Court's request.

CONCLUSION

For the reasons stated above, the plaintiffs move this Court for an order:

1. Amending the judgment to eliminate, pending decision on the motion for attorney's fees, any suggestion that each party is to bear its own costs;

2. Determining, pursuant to Fed. R. Civ. P. 54(d)(2)(C), that defendants are liable for reasonable attorney's fees and costs to the Baldus plaintiffs and the Voces plaintiffs;

3. Granting the Voces plaintiffs' request for $187,454.22 in attorney's fees and $25,995.56 in costs; and

4. Setting a date by which detailed submissions on the value of services by the Baldus plaintiffs' counsel are to be filed and then determined.

Dated: April 5, 2012.

LAW OFFICE OF PETER EARLE LLC

By: *s/ Peter G. Earle*

Peter G. Earle
State Bar No. 1012176
Jacqueline Boynton
State Bar No. 1014570
839 North Jefferson Street, Suite 300
Milwaukee, WI 53202
414-276-1076
peter@earle-law.com
Jackie@jboynton.com

Attorneys for Consolidated Plaintiffs

Dated: April 5, 2012.

GODFREY & KAHN, S.C.

By: *s/ Douglas M. Poland*

Douglas M. Poland
State Bar No. 1055189
Dustin B. Brown
State Bar No. 1086277
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
dpoland@gklaw.com
dbrown@gklaw.com

Attorneys for Plaintiffs

7704763_1

EXHIBIT A

INTERIM ITEMIZATION OF COSTS

28 U.S.C. § 1920

Fees of the Clerk (filing fee)	$ 350.00
Fees for Witnesses	$ 3,000.73
Cost of copies necessarily obtained for use in the case	$ 25,884.46
Other Costs:	
Expert Witness Fees	$ 46,691.34
Service of Process	$ 475.00
Deposition Transcripts	$ 28,753.03
Trial Transcripts	$ 3,495.96
TOTAL:	$108,650.52[1]

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[1] Subject to verification, supplementation, and authentication under 28 U.S.C. § 1924.

Brandt, Karen J (15243)

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Eastern District of Wisconsin

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Jose Perez
Erica Ramirez
Amy Risseeuw
Judy Robson
Gloria Rogers

Kellen C Kasper kkasper@foley.com, nkujath@foley.com

Maria S Lazar lazarms@doj.state.wi.us, welteaj@doj.state.wi.us

P Scott Hassett pshassett@yahoo.com, lroth@lawtoncates.com

Pamela S Moorshead pmoorshead@wi.rr.com

Patrick J Hodan phodan@reinhartlaw.com, sangotti@reinhartlaw.com

Peter G Earle peter@earle-law.com, jbrennan@motleyrice.com

Rebecca K Mason rmason@gklaw.com, aseligman@gklaw.com, dbrown@gklaw.com, jhaseleu@gklaw.com, jschwartz@gklaw.com, mveldran@gklaw.com, warends@gklaw.com

Thomas L Shriner , Jr tshriner@foley.com, kszyszko@foley.com

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bf94f457f0a39360207f6ccdf337415cc4f79876290871894de389a66081]]
Document description: Exhibit A: Interim Itemization of Costs
Original filename:
Electronic document Stamp:
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